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No. 86-273

In The

Supreme Court of the United States

October Term, 1986

THE STATE OF TEXAS,

Petitioner,

vs.

THOMAS EDGAR DANIELS
A/K/A THOMAS EDGAR AUSTIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

(i)

Did the Texas Court of Criminal Appeals err, and if so, is the error of sufficient importance to justify review by this Court, in holding that Respondent was illegally detained by police officers without reasonable suspicion?

(ii)

Should this Court grant Certiorari because it does not accept the rationale of the Texas Court of Criminal Appeals opinion when the judgment entered by that Court recognized and tracked existing applicable federal and state court decisions?

LIST OF PARTIES

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TABLE OF CONTENTS

	Pages
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
THE OPINIONS BELOW	1
STATEMENT OF THE CASE	2
A SUMMARY OF THE ARGUMENT	5
ARGUMENT	
1. Introduction	6
2. The Opinion By The En Banc Court Is Correct	6
3. There Is No Material Conflict Between The Circuits	10
CONCLUSION	11
APPENDIX A	1a

TABLE OF AUTHORITIES

Pages

CASES

Davis v. State, 576 S.W.2d 378, 380 (Tex. Cr. App. 1979) 6, 9

Falk v. State, 574 S.W.2d 764, 766 (Tex. Cr. App. 1979) 8

Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319, 75 L.Ed.2d 229 (1983) 6

Glass v. State, 681 S.W.2d 599, 602 (Tex. Cr. App. 1984) 8

Meeks v. State, 653 S.W.2d 6, 12 (Tex. Cr. App. 1983) 9

Reid v. Georgia, 448 U.S. 438, 100 S. Ct. 2752, 65 L.Ed.2d 890 (1980) 6, 8

Rodriguez v. State, 578 S.W.2d 419 (Tex. Cr. App. 1979) 8

United States v. Berry, 670 F.2d 583 (5th Cir. 1982) 9

United States v. Glass, 741 F.2d 93 (5th Cir. 1984) 8

United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, 64 L.Ed.2d 497 (1980) 6

United States v. Place, 462 U.S. 696, 103 S. Ct. 2637, 77 L.Ed.2d 110 (1983) 6

CONSTITUTIONAL PROVISION

Amendment IV to The United States Constitution 2, 5, 10

Amendment XIV to The United States Constitution 2, 5, 10

STATUTE

Article 4476-15 Vernon's Annotated Texas Statutes 2

RULE

Rule 17, Rules of The Supreme Court of the United States 5

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—o—

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—o—

THE OPINIONS BELOW

The citations to the opinions below which appear in the Petition for Certiorari are correct.[1]

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1. The Petition for Writ of Certiorari is herein cited as Pet. p. The appendices to that Petition are cited by the appendix page number as App. ————a.

STATEMENT OF THE CASE

On April 12, 1982, Respondent was charged by indictment with possession of cocaine in violation of Article 4476-15, Vernon's Annotated Texas Statutes. On February 7, 1983, Respondent entered a plea of not guilty and was found guilty by the trial court following denial of a Motion To Suppress evidence introduced against Respondent. Respondent presented two grounds of error on appeal to the Court of Appeals for the Fourteenth Supreme Judicial District of Texas. On January 26, 1984, the Court of Appeals affirmed Respondent's conviction. On April 9, 1986, the Court of Criminal Appeals of Texas, en banc, reversed the decision of the Court of Appeals and held that the seizure of Respondent and subsequent discovery of the controlled substances violated Amendments IV and XIV of the United States Constitution and applicable federal and state court decisions.

The series of events leading up to Respondent's arrest took place on or about March 5, 1982, in Houston, Texas. At 9:00 o'clock a.m., Officers Furstenfeld and Bernias of the Houston Police Department were at Houston Intercontinental Airport watching passengers deplane from a nonstop flight from Miami, Florida. (R.V.II-p.4).[2] This surveillance was conducted in an attempt to identify and intercept narcotics carriers who were suspected of bringing drugs into the Houston area. The officers were not operating on information from an informant or law enforcement agency but were scanning passengers to see

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2. Citations from the record of the trial court are cited by reference to Volume and page as R.V.——p.——.

if any aroused their suspicions. The officers became suspicious of Respondent and a Co-Defendant. (R.V.II-p.4-5).

Officer Furstenfeld testified that he was first suspicious because the men were coming from Miami, a known source city for narcotics traffic. Of course, this was true of all the passengers departing from this particular flight. What distinguished Respondent and his companion in Officer Furstenfeld's eyes were that two men deplaned separately but then their eyes met. (R.V.II-p.5). After a brief nod from one of them, they proceeded down the concourse without speaking but looking around nervously. Officer Furstenfeld concluded the two were travelling together but trying to distinguish the fact. He also thought they were looking back furtively as if trying to detect surveillance. If so, they were unsuccessful, because Officers Furstenfeld and Bernias followed the men to the baggage claim area without being detected.

In the baggage claim area, one of the suspects handed his suit bag to the other and went to the restroom. Upon his return, the men stood together talking and joking, until a white suitcase arrived. (R.V.II-p.9). After Respondent claimed the bag, he and his companion took an elevator to the covered parking area. (R.V.II-p.10). They were joined in the elevator by the two narcotics officers. When all four were in the parking area, Officer Furstenfeld spoke to Respondent. (R.V.II-p.11). What happened next was a matter of dispute at the Motion To Suppress hearing held at the trial court level. Officer Furstenfeld approached Respondent and asked Respondent if he might ask a few questions. The officer identified himself as a police officer conducting an investigation. (R.V.II-p.11).

Officer Furstenfeld asked Respondent if he and the other man were travelling together. Respondent replied they were not. (R.V.II-p.12, 47-48). Officer Furstenfeld asked for Respondent's identification and plane ticket. Respondent handed the officer a temporary Texas Driver's License in the name of Thomas Daniels and a ticket folder that contained two tickets, one made out to G. Daniels and the other S. Bogden. (R.V.II-p.13). Officer Furstenfeld returned these items to Respondent and informed him that the officer was a narcotics officer conducting an investigation. (R.V.II-p.14). Officer Furstenfeld testifed that Respondent grew visably more nervous at this point in time. (R.V.II-p.15). Officer Furstenfeld testified that he asked permission to search Respondent's luggage and informed him that he did not have to consent but could require the officer to produce a search warrant. It was Officer Furstenfeld's testimony that the Respondent consented to the search which revealed tablets which the officer believed to be illegal drugs and arrested Respondent. Respondent's testimony was that he was stopped by Officer Furstenfeld as soon as he stepped off the elevator, when Furstenfeld blocked his path and identified himself as a police officer. (R.V.II-p.48). Respondent further testified the officer inquired as to why Respondent had not arrived the night before as he had previously been scheduled. Respondent testified the officer neither asked for nor received consent to search Respondent's suitcase or his person. (R.V.II-p.49). Respondent further testified that at no point was he informed that he could ask the officer to produce a search warrant prior to any search being conducted. (R.V.II-p.49).

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A SUMMARY OF THE ARGUMENT

Respondent asserts that the only objection Petitioner has to the opinion of the Court of Criminal Appeals of Texas is that the controlling law in this area dealing with search and seizure needs to be reversed. The Court of Criminal Appeals of Texas relies on both federal law involving the Fourth and Fourteenth Amendments of the United States and Texas law to determine whether the investigative stop of Respondent needed to be based on specific articulate facts leading to a reasonable suspicion of criminal activity.

Petitioner has not shown, in accordance with Rule 17, Rules of The Supreme Court of the United States, that the Court of Criminal Appeals of Texas has decided a federal question in conflict with the decision of another state court of last resort or a Federal Court of Appeals. Nor has Petitioner shown that the Court of Criminal Appeals of Texas has decided an important question of federal law which has not been, but should be, settled by this Court. Nor has Petitioner shown that the Court of Criminal Appeals of Texas has decided a federal question in a way in conflict with applicable decisions of this Court. Petitioner alleges that the Court of Criminal Appeals did not discuss Texas law (Pet.p.3) yet the opinion of the Court of Criminal Appeals contained in Appendix "A" is replete with citations and legal reasoning based upon the current law as it exists in the State of Texas.

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ARGUMENT

1. Introduction.

The underpin of Petitioner's argument is that the opinion of the Texas Court of Criminal Appeals of Texas is based solely on the Court's interpretation of federal law. In Petitioner's words, the Court of Criminal Appeals did not discuss Texas law. (Pet.p.3). Petitioner's argument center around what Petitioner considers confusion in the area of an investigative stop based on a drug courier profile created by this Court's decisions in the four cases of *United States vs. Place,* 462 U.S. 696, 103 S. Ct. 2637, 77 L.Ed.2d 110 (1983), *Florida vs. Royer,* 460 U.S. 491, 103 S. Ct. 1319, 75 L.Ed.2d 229 (1983), *United States vs. Mendenhall,* 446 U.S. 544, 100 S. Ct. 1870, 64 L.Ed.2d 497 (1980), and the case of *Reid vs. Georgia,* 448 U.S. 438, 100 S. Ct. 2752, 65 L.Ed.2d 890 (1980).

The result that the Texas Court of Criminal Appeals Court reaches is by analyzing applicable federal and state law and applying it to the facts and circumstances that exist in this matter. The Texas Court of Criminal Appeals in their decision re-emphasizes the holding in *Davis vs. State,* 576 S.W.2d 378, 380 (Tex. Cr. App. 1979), concerning the requirement that an officer must have specific and articulable facts justifying his suspicion before an investigatory stop will be valid. (App. 11a).

2. The Opinion By The En Banc Court Is Correct.

Respondent submits that this Court should not disturb the En Banc Court's opinion because that opinion properly states current federal and state law.

The principles and legal reasoning utilized by the Texas Court of Criminal Appeals in reaching a decision involved aspects of both federal and state law. The Court of Criminal Appeals analyzed the three to four factors that Officer Furstenfeld testified to as being the factors that aroused his suspicion concerning Respondent. The initial factors that the Court recognized were that (1) Respondent deplaned separately from his companion but then made eye contact with him, (2) Respondent appeared nervous and looked behind him on two occasions as he walked down the concourse and (3) Respondent arrived on a flight from Miami. (App. 5a). As noted by the Court in their opinion, Respondent and his companion did a very poor job of concealing the fact they were travelling together, if that was their intent. The issue of deplaning separately should not have raised any suspicion because the officer testified that he had no prior information about Respondent and/or his companion before his observations of them in the airport area. Respondent and his companion stood together in the baggage claim area talking and joking, and Respondent held the bag of his companion during a period of time that his companion went to the restroom. (App. 5a). Clearly, this would indicate to any reasonable person the fact that Respondent and the Co-Defendant were not trying to hide their companionship or the fact that they were acquainted. Respondent's arrival from Miami, a "source city", did not distinguish him from any other passenger on the nonstop flight on this particular day. (App. 5a). Furthermore, with the influx of drug trafficking prevalent throughout the United States, almost any major city could be considered a "source city". As to the nervousness and furtive

eye movements, the Court of Criminal Appeals relied not only on this Court's holding in *Reid vs. Georgia,* supra, but additionally looked to two (2) state court cases, *Rodriquez vs. State,* 578 S.W.2d 419 (Tex. Cr. App. 1979), and *Falk vs. State,* 574 S.W.2d 764, 766 (Tex. Cr. App. 1979). In *Rodriquez,* the same Court held it unreasonable to stop a pedestrian solely because he looked over his shoulder at a police car. Relying upon not only *Reid vs. Georgia,* but *Rodriquez and Falk,* the Court of Criminal Appeals held that furtive eye movements and looking over the shoulder would not be reasonable grounds for suspicion when they are consistent with innocent behavior. (App. 6a).

The Court reviewed the factors that formed the basis for suspicion by the officer during questions directed to Respondent. (App. 9a). Those factors as elicited through the testimony of the officer were that (1) Respondent grew visably more nervous when the officer identified himself as a narcotics officer; (2) Respondent's driver's license identified him as Thomas Daniels, and his plane ticket was in the name of G. Daniels, and (3) Respondent denied travelling with his companion but was carrying two (2) plane tickets at the time of the initial approach by the officer.

Relying upon the Texas case of *Glass vs. State,* 681 S.W.2d 599, 602 (Tex. Cr. App. 1984), the Court held that nervousness when suddenly confronted by a police officer who asks questions is as indicative of innocence as of guilt. (App. 9a). As to the discrepancy in the initials, the Court relied upon *United States vs. Glass,* 741 F.2d 93 (5th Cir. 1984) which held that someone travelling under an assumed name does not give rise to a reasonable suspicion

that he is carrying narcotics. As noted in the Court's opinion, Respondent was travelling not under an assumed name but only with a misprinted initial, and additionally, the ticket was paid for with a credit card bearing Respondent's correct name, the imprint of which appeared on the ticket. (App. 9a, 10a). The Court recognized that the officer testified that Respondent did not say he did not know the third party, only that he was not travelling with him. (App. 10a). Furthermore, as the Court noted, the officer had not yet spoken to the Co-Defendant, did not know his name, and had no way of knowing whether the second ticket was the Co-Defendant's at that point in time. Again relying on the Texas case of *Meeks vs. State*, 653 S.W.2d 6, 12 (Tex. Cr. App. 1983), the Court held that even if the officer's conclusion that Respondent was lying gave rise to a reasonable suspicion that some activity out of the ordinary had occurred, it was not a reasonable ground for concluding that the unusual activity was criminal, or that Respondent was connected to the hypothetical crime. (App. 10a).

The Court then correctly reached the conclusion that the issue of consent, whether valid or not, became moot because of the illegal stop and seizure of evidence. (App. 11a). As noted in footnote four (4) by the Court of Criminal Appeals, the Court found it highly unusual as did the Fifth Circuit Court of Appeals in *United States vs. Berry*, 670 F.2d 583 (5th Cir. 1982), that so many individuals stopped at airports consent to search while carrying drugs. (App. 10a). The Court then concludes its totality of the findings by reiterating the requirement from *Davis vs. State*, supra, that to allow searches without actual justification would eviscerate the Fourth Amendment guaran-

tees against unreasonable search and seizure. The test is whether the facts known to the officer at the moment of the stop and search would warrant a man of reasonable caution in his belief that the action taken was appropriate.

Respondent submits that this Court should deny certiorari. The opinion of the Court below does not affect any of the basic legal principles underlying the protection of the Fourth and Fourteenth Amendment. Nor does the opinion of the Court below change the law or affect the law as it currently exists in the United States and the State of Texas. As is prevalent throughout the Court of Criminal Appeals opinion, state law of Texas constituted a major factor in their decision to reverse and remand this matter to the trial court.

3. There Is No Material Conflict Between The Circuits.

There is no material conflict between the decision of the Texas Court of Criminal Appeals and other state and federal courts. The Petitioner asserts that the opinion of the Court of Criminal Appeals of Texas (En Banc) affords this Court the opportunity to restate and clarify the controlling law in the area of drug courier profile searches. (Pet.p.9). Yet nothing in Petitioners' arguments assert that this court of last resort has decided a federal question in conflict with the decision of another state court of last resort or a Federal Court of Appeals. Furthermore, nothing in Petitioners' arguments assert that an important question of federal law has been decided by the Court of Criminal Appeals of Texas which has not been, but should be, settled by this Court or that the decision was in some way in conflict with applicable decisions by this Court.

CONCLUSION

The Court should deny the Application For Certiorari.

Respectfully submitted,

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APPENDIX A

NO. 379-84

THOMAS EDGAR DANIELS, a/k/a
THOMAS EDGAR AUSTIN, Appellant

v.

THE STATE OF TEXAS

Appellee

Petition for Discretionary Review from the Court of Appeals, Fourteenth Supreme Judicial District of Texas

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

After his Motion to suppress evidence was denied, appellant pled not guilty and was tried before the trial court. Appellant and the State entered into a stipulation of evidence on the basis of which appellant was found guilty of possession of a controlled substance and sentenced to five years imprisonment in the Texas Department of Corrections. His conviction was affirmed by the court of appeals. Daniels v. State, 681 S.W.2d 78 (Tex. App.—Houston [14th] 1984).

Appellant objected to the admission of evidence seized from him during an airport stop and search. The court of appeals held that the trial court properly overruled appellant's motion to suppress because the investigating officer had reasonable grounds to temporarily detain appellant and appellant then consented to the search of his suitcase. We granted appellant's petition to review these findings of the court of appeals.

At nine o'clock in the morning Officers Furstenfeld and Bernas of the Houston Police Department were at Houston Intercontinental Airport watching passengers deplane from a nonstop flight from Miami. This surveillance was conducted "in an attempt to identify and intercept narcotic couriers who are bringing dope into Houston." The officers were not operating on information from an informant or law enforcement agency, they were just scanning the passengers to see if any aroused their suspicions. Two men did.

Officer Furstenfeld testified that he was suspicious first of all because the men were coming from Miami, a known source city for narcotics traffic. Of course, that was true of all the passengers. What distinguished appellant and his companion in Officer Furstenfeld's eyes was that the two men deplaned separately but then their eyes met. After a brief nod from one of them, they proceeded down the concourse without speaking but looking around nervously. Furstenfeld concluded the two were travelling together but trying to disguise that fact. He also thought they were looking back furtively as if trying to detect surveillance. If so, they were unsuccessful because Furstenfeld and Bernias followed the men to the baggage claim area without being detected.

In the baggage claim area one of the suspects handed his suit bag to the other and went to the restroom. Upon his return, the men stood together, talking and joking, until a white suitcase arrived. Appellant claimed the bag and he and his companion took an elevator to the covered parking area. They were joined in the elevator by the two narcotics officers. Once all four were in the parking area, Officer Furstenfeld spoke to appellant. What happened

next was a matter of dispute at the hearing on the motion to suppress. However, viewing the evidence in the light most favorable to the trial court's ruling on the motion, the facts are these:[1] The officer approached appellant and asked if he might ask him a few questions. Appellant said sure. Furstenfeld identified himself as a police officer conducting an investigation and asked if he could question appellant. Appellant again consented. Furstenfeld asked if appellant and the other man were travelling together. Appellant replied that they were not. (The other man, Steve Bogden, had walked on ahead and been stopped by Officer Bernias.) The narcotics officer asked if he could see appellant's identification and plane ticket. Appellant handed him a temporary Texas driver's license in the name Thomas Daniels and a ticket folder that contained two tickets, one made out to G. Daniels and the other to S. Bogden. Furstenfeld returned these items and informed appellant that he was a narcotics officer. Appellant grew visibly more nervous at this news, Furstenfeld testified. He asked permission to search appellant's luggage, informing him that he did not have to consent, but could instead

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1. It was for the trial court, as the sole finder of fact at the suppression hearing, to determine whose version of the facts was true, and the court found that the arrest was lawful. Walker v. State, 588 S.W.2d 920, 924 (Tex. Cr. App. 1979).

Appellant's testimony was that he was stopped as soon as he stepped off the elevator, that Officer Furstenfeld blocked his path and identified himself as a police officer. He asked why appellant hadn't come in the night before, saying they had word a man fitting appellant's description was supposed to be in the airport the night before, bringing cocaine from Florida. Appellant testified further the officer neither asked for nor received consent to search the suitcase. "He slammed me around against the lockers and started searching." No one told appellant he could leave or demand a search warrant.

require the officer to produce a search warrant. Appellant, however, consented to the search. Furstenfeld found tablets he took to be illegal drugs, and arrested appellant. A subsequent search of appellant's person turned up the cocaine for possession of which he was convicted.

The questions to be decided are, when did the officer have legally sufficient reason to detain appellant, and when did he need it?

Not all encounters between police and citizens invoke the protection of the Fourth Amendment. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed2d 889 (1968). Police are as free as anyone else to ask questions of their fellow citizens. Only when the questioning becomes a detention, however brief, must it be supported by reasonable suspicion. Reasonable suspicion is a lesser quantum of proof than the probable cause required for a full blown arrest and search. Even a brief investigatory stop, however, must be based on "specific, articulable facts, which in light of [the police officer's] experience and general knowledge, together with rational inference from those facts, would reasonably warrant the intrusion of the freedom of the citizen stopped for further investigation." Brem v. State, 571 S.W.2d 314, 318 (Tex. Cr. App. 1978). A mere hunch is insufficient:

> "There must be a reasonable suspicion by the officer that some activity out of the ordinary is occurriing or had occurred, some suggestion to connect the detained person with the unusual activity, and some indication that the activity is related to a crime. Where the events are as consistent with innocent activity as with criminal activity, a detention based on those events is unlawful."

Johnson v. State, 658 S.W.2d 623, 626 (Tex. Cr. App. 1983). We must therefore determine at what point, if any, appellant was detained for purposes of the Fourth Amendment, and on what Officer Furstenfeld's suspicion was based at that point.

The officer first spoke to appellant just after the two exited from the elevator into the covered parking area, where it was clear appellant was leaving the airport. The officer's suspicion up to then had been aroused because: (1) appellant deplaned separately from Bogden but then made eye contact with him; Furstenfeld suspected they were travelling together but trying to hide the fact; (2) appellant appeared nervous and looked behind him as he walked down the concourse ("It wasn't continuous, but each looked about two times apiece"); and (3) appellant had arrived on a flight from Miami.

Clearly these were not reasonable grounds for any level of suspicion. If appellant and Bogden were trying to disguise the fact that they were travelling together, they did a very poor job of it. They deplaned separately but walked down the concourse side by side, though a few feet apart. Once in the baggage claim area they stood together talking and joking, and Bogden gave appellant his bag to hold while he went to the restroom. Furstenfeld, who saw all this, must have had allayed his suspicion that the men were trying not to appear to know each other. The fact that appellant was arriving from Miami did not distinguish him from any other passenger on the nonstop flight. That leaves only appellant's apparent nervousness and "furtive eye movements." As the United States Supreme Court said of a stop based on similar suspicions, these circumstances

> "describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify seizure."

Reid v. Georgia, 448 U.S. 438, 441, 100 S. Ct. 2752, 2754, 65 L.Ed.2d 890 (1980).

This Court has held it unreasonable to stop a pedestrian solely because he looks over his shoulder at a police car. Rodriguez v. State, 578 S.W.2d 419 (Tex. Cr. App. 1979). It would be no more reasonable to stop a man who looks over his shoulder twice in an airport concourse. As for the "furtive" eye movements, they could not have been more suspicious than the furtive gestures with which this Court has often dealt, which will not be reasonable ground for suspicion where they are consistent with innocent activity.

> ". . . , such so-called 'furtive-gestures' do not bear with them the indicia of a guilty mens rea as they would had the stopping police officer been occupying a marked police vehicle. In this case, it was an unmarked police vehicle."

Faulk v. State, 574 S.W.2d 764, 766 (Tex. Cr. App. 1979). In the instant case the plainclothes detective was the equivalent of an unmarked police car. It was no basis for suspicion that appellant, who had just disembarked from an airplane, acted nervous in the officer's presence.

So at the point of the initial encounter, Officer Furstenfeld had no grounds for reasonable suspicion. As we have already seen, however, he needed none. It was permissible for him to approach appellant and ask to speak with him. At that point appellant, in theory at least, could have still walked away freely.

Perhaps as in Eisenhauer v. State, 678 S.W.2d 947, 954 (Tex. Cr. App. 1984), appellant's seemingly innocent activity might have been rendered suspicious in light of an informant's tip, but here there was no tip. Officer Furstenfeld was acting strictly on the basis of what he observed.

Following the initial exchange the officer asked if appellant was travelling with Bogden and was told he was not. Officer Furstenfeld then asked to see appellant's ticket and identification. Noting that appellant carried two airline tickets and that one of them was made out to "G. Daniels" though appellant's driver's license gave his name as Thomas Daniels, the officer identified himself further as a narcotics officer conducting an investigation, and asked for consent to search appellant's suitcase. The State concedes this was a detention, and we agree.[2]

Officer Furstenfeld testified, "I advised him that if he so desired that he could require me to produce a search warrant prior to a search. I advised him that he did not have to consent to the search." On crossexamination, to the question, "So he could have picked up his suitcase and left?" he responded, "No, sir, I didn't tell him that." Furstenfeld said that in fact appellant was still free to take his suitcase and leave at that point, but when the same question was repeated, his answer was more ambiguous:

"Q. Would he have been free to take his suitcase and leave?

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2. Justice Brennan would also agree: "It is simply wrong to suggest that a traveller feels free to walk away when he has been approached by individuals who have identified themselves as police officers and asked for, and received, his airline ticket and driver's license." Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319, 1321, 75 L.Ed.2d 229 (1983) (Brennan, J., concurring).

A. We use custom dogs when we need them."

And later in response to the question what he would have done if appellant had refused to consent to the search: "I would have taken his name and address and held the bag until we had a chance to get a dog and the search warrant."

Less than probable cause is required to briefly seize a suspect's luggage. long enough to have it sniffed by dogs or to obtain a search warrant. United States v. Place, 462 U.S. 696, 103 S. Ct. 2637, 77 L.Ed.2d 110 (1983). Even such a brief detention, however, must be justified by "specific and articulable facts warranting a reasonable belief that a traveler's luggage contains narcotics." Id., at 2642.

The officer's response as to whether he would have allowed appellant to leave with his luggage at that point were contradictory. The test, though, is to be applied from the suspect's point of view, whether there has been such a display of authority that "a reasonable person would have believed he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L.Ed.2d 497 (1980). This Court applied that test in Eisenhauer, supra, and found the suspect there was effectively seized when surrounded in an airport terminal by four plainclothes police officers who told him he was suspected of transporting narcotics, asked for permission to search his bag, and gave no indication that he was free to leave.

Appellant in the instant case would be similarly unlikely to think himself free to leave when he had been

stopped by an armed man[3] who identified himself as a narcotics officer, a few feet away Bogden had been stopped by another officer, Furstenfeld said he was conducting an investigation, implied that he could obtain a search warrant, and gave no indication appellant could depart. At this point the encounter amounted to at least an investigatory stop. Reasonable suspicion was therefore required to justify it.

In Eisenhauer, supra, an informant's tip supplied a strong ground for reasonable suspicion after much of its information was verified. Here there was no such tip. The additional bases for suspicion turned up by Furstenfeld's questioning of appellant were (1) appellant grew visibly more nervous when his questioner identified himself as a narcotics officer; (2) appellant's driver's license identified him as Thomas Daniels and his plane ticket was in the name of G. Daniels; and (3) appellant denied travelling with Bogden but was carrying two plane tickets and Furstenfeld had seen the two men together.

As for the first factor, nervousness when suddenly confronted by a police officer who asks one questions is as indicative of innocence as of guilt. Glass v. State, 681 S.W.2d 599, 602 (Tex. Cr. App. 1984). Many people react nervously to being approached by police.

The discrepancy in initials is of little consequence. In United States v. Glass, 741 F.2d 83 (CA5 1984), it was held that even in the light of an initial anonymous tip, the fact that someone is travelling under an assumed name

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3. Appellant testified he had seen the officer's gun, and no witness contradicted him.

does not give rise to a reasonable suspicion that he is carrying narcotics. Here appellant was travelling only under an assumed initial, but he had paid for his ticket with a credit card bearing his correct name, the imprint of which appeared on the ticket.

This leaves as the basis for suspicion only that appellant denied he was travelling with Bodgen. It was clear the two men knew each other, but Officer Furstenfeld testified specifically that appellant did not say he did not know Bogden, only that he was not travelling with him. Yet appellant had two airline tickets in his ticket folder. As Furstenfeld had not yet spoken to Bodgen, however, and did not know his name, he had no way of knowing whether the second ticket was his. It was as likely the two men had just met on the plane and would be going their separate ways again when they reached their cars; on that appellant feared Bogden was the actual focus of a police investigation and wished to disassociate himself from him. Even if Furstenfeld's conclusion that appellant was lying gave rise to a reasonable suspicion "that some activity out of the ordinary is occurring or has occurred," it was not a reasonable ground for concluding that the unusual activity was criminal or that appellant was connected to the hypothetical crime. Meeks v. State, 653 S.W.2d 6, 12 (Tex. Cr. App. 1983).

There is finally the issue of appellant's alleged consent to search his luggage.[4] It is at least arguable that Fursten-

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4. Reviewing the facts in the light most favorable to the trial court's ruling we assume appellant did consent to the search

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feld's telling appellant he could force the officer to obtain a warrant for the search implied that a warrant could be obtained, leaving appellant to conclude a search was inevitable with or without his consent. That would have rendered the consent invalid. See Doescher v. State, 578 S.W.2d 385, 391 (Tex. Cr. App. 1979). We need not reach that issue because the consent, valid or not, was the result of the illegal stop and thus fatally tainted by the illegality of the stop. United States v. Glass, supra; United States v. Ballard, 573 F.2d 913, 916 (CA5 1978).

We reiterate what was said in Davis v. State, 576 S.W.2d 378, 380 (Tex. Cr. App. 1979), concerning the requirement that an officer have specific and articulable facts justifying his suspicion before an investigatory stop will be valid:

> "This requirement must not become a mere form of words. To allow searches without actual justification would eviscerate the Fourth Amendment guarantes against unreasonable search and seizure. The test is whether the facts known to the officer at the moment of the stop and search would warrant a man of reasonable caution in belief that the action taken was appropriate."

The facts known to the officer in the instant case did not render his action appropriate. The evidence seized as

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of his suitcase. We note, however, the remark by the Fifth Circuit Court of Appeals in United States v. Berry, 670 F.2d 583 (CA5 1982) at n. 16: "We think it strikingly unusual that so many individuals stopped at airports consent to search while carrying drugs, and even show where they have hidden drugs. Though 'the question is not whether respondent acted in her self-interest [by consenting to a search], but whether she acted voluntarily,' the courts should consider how reasonable a story is in determining whether consent was given voluntarily [citations omitted throughout]."

a result of the illegal stop should have been suppressed. Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963).

The judgment of the court of appeals is reversed and the cause is remanded for new trial.

CLINTON, Judge

(Delivered April 9, 1986)

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McCormick, J., dissents